

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

STATE OF WASHINGTON; STATE OF)	
CALIFORNIA; STATE OF COLORADO;)	
STATE OF CONNECTICUT; STATE OF)	
DELAWARE; DISTRICT OF COLUMBIA;)	CASE NO. C20-00111-RAJ
STATE OF HAWAII; STATE OF)	
ILLINOIS; STATE OF MAINE; STATE)	SEATTLE, WASHINGTON
OF MARYLAND; COMMONWEALTH OF)	
MASSACHUSETTS; STATE OF)	February 28, 2020
MICHIGAN; STATE OF MINNESOTA;)	9:00 a.m.
STATE OF NEW JERSEY; STATE OF)	
NEW MEXICO; STATE OF NEW YORK;)	MOTION FOR PRELIMIINARY
STATE OF NORTH CAROLINA; STATE)	INJUNCTION HEARING
OF OREGON; COMMONWEALTH OF)	
PENNSYLVANIA; STATE OF RHODE)	
ISLAND; STATE OF VERMONT;)	
COMMONWEALTH OF VIRGINIA and)	
STATE OF WISCONSIN,)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
STATE, et al.,)	
)	
Defendants.)	
)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff
STATE OF WASHINGTON: KRISTIN BENESKI
JEFFREY GEORGE RUPERT
BRENDAN C. SELBY
State of Washington AG's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

For the Defendant
UNITED STATES: ERIC SOSKIN
MATTHEW J. GLOVER
Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20002

For the Intervenor
NSSF
and Fredric's Arms: PRATIK SHAH
RACHEL BAYEFSKY
ROSS SILER
Akin Gump Strauss Hauer & Feld
2001 K Street NW
Washington, D.C. 20006

Appearing Telephonically for the Plaintiffs:

Jeffrey Dunlap for the State of Maryland
John Killeen for the State of California
Darren Kinkead for the State of Illinois
Nicholas Sydow for the State of New Mexico
Christian Wright for the State of Delaware

Appearing Telephonically for the Intervenor:

Lawrence Keen

Reported by: NANCY L. BAUER, CCR, RPR
Federal Court Reporter
700 Stewart Street, Suite 17205
Seattle, WA 98101
(206) 370-8506
nancy_bauer@wawd.uscourts.gov

PROCEEDINGS

THE CLERK: We are here in the matter of the State of Washington, et al. v. United States Department of State, et al., Cause No. C20-111, assigned to this court.

If counsel in the courtroom could please rise and make your appearances for the record.

MR. RUPERT: Jeffrey Rupert, assistant attorney general for the State of Washington.

THE COURT: Good morning.

MS. BENESKI: Kristin Beneski, assistant attorney general for the State of Washington.

THE COURT: Good morning.

MS. BENESKI: Good morning.

MR. SELBY: Brenden Selby, assistant attorney general for the State of Washington.

THE COURT: Good morning.

And on the telephone?

MR. WRIGHT: Good morning, Your Honor. This is Christian Douglas Wright with the Delaware Department of Justice for the State of Delaware.

THE COURT: Good morning.

MR. DUNLAP: Good morning, Your Honor. This is Jeffrey Dunlap appearing on behalf of plaintiff, State of Maryland.

1 THE COURT: Good morning.

2 MR. KINKEAD: Good morning, Your Honor. This is
3 Darren Kinkead for the Illinois Attorney General.

4 THE COURT: Good morning to you as well.

5 MR. SYDOW: Good morning, Your Honor. Nicholas Sydow
6 on behalf of the State of New Mexico.

7 THE COURT: Good morning.

8 MR. KILLEEN: Good morning, Your Honor. John Killeen
9 on behalf of the State of California.

10 THE COURT: Good morning.

11 Is Mr. Boyer on the line?

12 MR. KEEN: Lawrence Keen from the National Shooting
13 Sports Foundation.

14 THE COURT: Good morning, sir.

15 Now, those on the telephone, if, at any point in time, you
16 can't hear the court, would you immediately alert the court?
17 I'd also ask that everyone present in the courtroom turn your
18 cell phones completely off. Just as it was before Judge
19 Lasnik, I have the same system here. It interferes with the
20 ability for transmission to take place.

21 Also, there's absolutely no recordings to take place of
22 the proceedings that are going on this morning. That would
23 require court permission, and I'm certainly not giving that
24 permission.

25 My understanding is the plaintiffs in this matter,

1 Mr. Rupert and Ms. Beneski, will be arguing; is that correct,
2 counsel?

3 MR. RUPERT: Yes, Your Honor.

4 THE COURT: All right.

5 Now, for the defendants?

6 MR. SOSKIN: Good morning, Your Honor. Eric Soskin,
7 Senior Trial Counsel, Civil Division, Federal Programs
8 Branch, U.S. Department of Justice for the federal
9 defendants.

10 THE COURT: Good morning.

11 MR. GLOVER: Good morning, Your Honor. Matthew
12 Glover, counsel to the Assistant Attorney General Civil
13 Division, also for the federal defendants.

14 THE COURT: Good morning, both of you.

15 MR. SILER: Good morning, Your Honor. Ross Siler on
16 behalf of the intervenor defendants.

17 THE COURT: Good morning.

18 MR. SHAH: Good morning, Your Honor. Pratik Shah on
19 behalf of the intervenor defendants.

20 THE COURT: Good morning.

21 MS. BAYEFSKY: Good morning, Your Honor. Rachel
22 Bayefsky for the intervenor defendants.

23 THE COURT: And my understanding is that there will
24 be split time between Mr. Soskin and Mr. Glover; is that
25 correct?

1 MR. SOSKIN: Yes, Your Honor.

2 THE COURT: And then for the intervenors, just
3 Mr. Shah will be arguing; is that correct?

4 MR. SHAH: Yes, Your Honor.

5 THE COURT: And I take it there are no other
6 individuals on the phone that are appearing on behalf of the
7 intervenors or the defendants; is that correct?

8 All right. That being the case, the court is going to
9 take the following approach: Now, I know all of you came
10 prepared to begin with your remarks, but there's a number of
11 questions that I have that I'd like to have clearly answered
12 before we begin. I'll certainly give you the opportunity to
13 make your comments and arguments to the court, but I want to
14 make sure that the court gets the answers to the questions
15 that I have.

16 I'm not sure who is going to go first, Mr. Rupert or
17 Ms. Beneski. Who is going first?

18 MR. RUPERT: It was my intention to go first, but
19 your questions may dictate a different order. I was going to
20 cover the merits and severability, and Ms. Beneski is going
21 to do jurisdictional issues.

22 THE COURT: Why don't we begin -- if you need to
23 tag-team or tap-out, whichever you prefer to do, you'll
24 certainly have the opportunity to do that. I want to make
25 sure that both of you have a chance to address the court.

1 My first question to the plaintiffs in this case is that
2 NSSF is joined in this proceeding, and I trust, because
3 there's nothing in the briefing to indicate, that there isn't
4 any opposition to their intervention; is that correct?

5 MR. RUPERT: That's correct, Your Honor.

6 THE COURT: Now, my next question is with respect to
7 the issues of standing and jurisdiction. What's different
8 now compared to the last time you were here before
9 Judge Lasnik?

10 MR. RUPERT: I'm just going to turn my colleague over
11 to that, but, I think, the short answer we're going to say is
12 no, but I'll let her give a more full one, and if you have
13 follow-up.

14 THE COURT: Okay. That's fine.

15 MS. BENESKI: Yes, Your Honor. The answer to that
16 question is no, there's no substantial difference in the
17 posture here.

18 The prior case involved the removal of 3D-printed gun
19 files from the U.S. Munitions List, and, here, we also have a
20 removal from the Munitions List. The only difference is that
21 there is an accompanying transfer of those items to an agency
22 that, as we read the regulations, will not effectively
23 regulate them.

24 THE COURT: My next question is, why does harm,
25 quote, likely to arise within the United States, closed

1 quote, fall outside the scope of the AECA? In other words,
2 the statutory language of the AECA seems to explicitly put
3 forth such harm within its purview.

4 MS. BENESKI: I'm sorry, Your Honor. I'm not sure
5 that I understand your question.

6 THE COURT: Well, I'm trying to get to the specifics
7 of -- there's reference to "likely to arise within the United
8 States" in terms of the harm, and I'm trying to find why does
9 that fall outside the scope of the AECA, or does it?

10 MS. BENESKI: I would say that the AECA is concerned,
11 primarily, with matters of national security and foreign
12 policy, and national security overlaps a great deal with
13 domestic security.

14 Just to take the example of international terrorism. If
15 these rules were to go into effect, it will allow the global
16 dissemination of these firearm files, making it easy for
17 terrorists to access weapons that are undetectable in a metal
18 detector. So they could potentially smuggle those through
19 TSA security, bring them on an airplane where they can be
20 used to harm U.S. citizens, including the citizens and
21 residents of plaintiff states.

22 THE COURT: My next question, counsel, is the Export
23 Control Reform Act seems to explicitly remove the functions
24 they're under from judicial review, including its CCL
25 regulations, does it not?

1 MS. BENESKI: What the ECRA exemption from judicial
2 review does is it exempts functions exercised under the ECRA.
3 And what we're challenging here is not exactly a function
4 exercised under the ECRA; rather, it is the combined effect
5 of these two intertwined and interrelated agency rules.

6 If the State rule is reviewable, which we think that it
7 clearly is, the Commerce rule is also reviewable for the same
8 reason. And I'd be happy to go into more detail on that.

9 THE COURT: Why don't you go into more detail on that
10 one, counsel.

11 MS. BENESKI: Sure.

12 So, again, if the ECRA exemption applies to anything, it
13 applies only to the Commerce rule, not to the State rule.

14 But looking at each rule in isolation is not really the
15 best way of understanding them, because of the way the rules
16 are written. They are so intertwined, by design, that if the
17 State rule is reviewable, again, it means that the Commerce
18 rule has to be reviewed as well, because they're all part of
19 the same -- they're both accomplishing the same function,
20 which is a transfer of jurisdiction from the State Department
21 to the Commerce Department. And I'll make a couple of points
22 on that.

23 The rules are self-described companion rules. To quote
24 the State rule: The, quote, combined effect of the two rules
25 is to, quote, transfer the items from State to Commerce.

1 And the rules incorporate each other's reasoning, and they
2 extensively reference each other in the preambles. So we
3 think that the ECRA exemption cannot foreclose review of
4 these intertwined rules.

5 Again, the key here is the combined effect, which is the
6 transfer of jurisdiction, and that transfer is not an ECRA
7 function; it's, rather, these two companion rules working
8 together.

9 And I'd also like to point out the case law on this is
10 very clear. There was a strong presumption in favor of
11 judicial review, and in order to overcome that presumption,
12 you need clear and convincing evidence that Congress meant to
13 foreclose judicial review in a particular scenario. That is
14 not the case here.

15 This is not an ordinary, run-of-the-mill export control
16 function being performed by the Commerce Department; rather,
17 it's a massive regulatory overhaul through two intertwined
18 rules, as I mentioned.

19 And it's also important to emphasize that no one had
20 notice that this massive regulatory overhaul was going to
21 affect 3D-printed firearm files at all, at all, and certainly
22 not in the particular way that these rules do.

23 This lawsuit, Your Honor, is the first and only
24 opportunity for any member of the public to weigh in on this
25 jurisdictional transfer of these extremely dangerous computer

1 files.

2 And I hope that answers your question.

3 THE COURT: It does, counsel. I'm going to come back
4 to that, but I want to get through my questions.

5 The provisions of the AECA permits the President or its
6 agents to remove items from the Munitions List, subject to
7 Congressional notice, and I don't think there's any dispute
8 about that.

9 So how is it that the State rule is contrary to law when
10 the AECA provides the check for the abuse you're claiming?
11 That is, that the State Department did not heed congressional
12 direction in its evaluation of what should be subject to the
13 USML.

14 MS. BENESKI: I think I'll let Mr. Rupert go into
15 more detail on that question, but I believe the short answer
16 is, because this is done by a regulation, that regulation has
17 to comply with the Administrative Procedure Act, and that
18 includes notice and comment, but I'll let Mr. Rupert discuss
19 that.

20 THE COURT: The court always likes shorter answers as
21 opposed to longer answers, counsel, so is this going to be a
22 better answer than the one she's provided?

23 MR. RUPERT: No. She's succinctly given one there.

24 THE COURT: All right.

25 The AECA appears to specifically require notice to

1 Congress when an item is removed. So shouldn't that be where
2 plaintiffs should be taking this issue? In other words,
3 shouldn't this be going to Congress as opposed to the courts?

4 MS. BENESKI: No, Your Honor. Because, again, in
5 order to comply with the Administrative Procedure Act, the
6 State Department had to comply with notice and comment
7 procedures before promulgating a regulation that takes this
8 action. And, again, no one had any notice that these
9 companion rules were going to affect 3D-printed firearm
10 files.

11 THE COURT: Well, I read through a lot of the
12 materials, and I can't give you a precise, pinpoint
13 designation, but it appears that there were some formal
14 comments that resulted as a result of this change.

15 So what's your understanding of the extent of any comments
16 that did occur or do exist?

17 MS. BENESKI: Again, I think Mr. Rupert can
18 potentially speak more to that, but I will do my best to
19 answer the court's question.

20 What happened here is, after the notice and comment period
21 closed back in 2018, then it was revealed that the federal
22 government had entered a settlement agreement with Defense
23 Distributed, and when that settlement agreement became
24 public, that's when it became clear that the rules were
25 removing 3D-printed firearm files from the Munitions List,

1 and at that point, there was a massive outcry, and the State
2 Department received over 106,000 emails, informal comments
3 because the comment period was closed, but emails from
4 concerned members of the public.

5 THE COURT: But other than that, no other formal
6 record, that you're aware of, of public-comment
7 participation?

8 MS. BENESKI: There were some comments in the
9 original rulemaking record that noted the fact that, by
10 removing technical data related to Category 1 firearms from
11 the Munitions List could affect 3D-printed guns, but those
12 comments were speculating on the way these rules might
13 ultimately work; in other words, no one had notice of the way
14 the final rules that have been promulgated would actually
15 regulate or, rather, not regulate 3D-printed firearms.

16 THE COURT: Mr. Rupert, do you want to supplement
17 that answer?

18 MR. RUPERT: No. It's the perfect answer.

19 THE COURT: Where does the court need to draw the
20 line in terms of the amount of notice required? In other
21 words, is it notice of the USMIL? Aren't those categories
22 sufficient on the issue of notice?

23 MS. BENESKI: No, Your Honor. The notice in this
24 case was beyond deficient. For one thing, the original
25 notices of proposed rulemaking, the NPRMs, did not even

1 mention 3D-printed firearms, and we think that's extremely
2 significant because the files we're talking about here are so
3 unique and so dangerous that notice of the fact that they
4 would be affected by this deregulation was required. And
5 then to add on to that, there was no notice whatsoever of how
6 the Commerce Department would purport to regulate these items
7 because, under the original proposed rules, it wouldn't have.
8 There was no subsection c of 734.7 of the Commerce rule -- no
9 notice was ever provided of that provision. It's an
10 extremely complex, confusing new provision.

11 THE COURT: So when would have been the first
12 notification that that existed?

13 MS. BENESKI: The very first time the public learned
14 of that was when these final rules were published at the end
15 of last month.

16 THE COURT: All right.

17 Counsel, what I'd like to do is talk to you about the
18 scope of relief. And, again, I'm not cutting off the
19 additional argument you'll be able to make, but I just want
20 to cover certain areas.

21 MS. BENESKI: I think, for this line of questioning,
22 I will go ahead and turn it over to Mr. Rupert, if that's all
23 right with the court.

24 THE COURT: That's fine.

25 One of the things I want to know, counsel, is -- I want to

1 talk about the scope of the injunctive relief.

2 Are plaintiffs, in effect, requesting a nationwide ban on
3 the rules? Here's what my concern is: There's 17 states
4 which have joined. There's 17 parties from the plaintiffs'
5 perspective, but wouldn't the effect of this type of relief,
6 because it's Internet publication, result in a nationwide
7 ban?

8 MR. RUPERT: It would, Your Honor. That's the whole
9 nature of this, because these rules, actually, are designed
10 to regulate exports. But as Judge Lasnik found, the Internet
11 is not a domestic and international situation; rather, it's
12 everywhere. But we're mindful of the court's concerns,
13 seeing how the Supreme Court has reacted, but we just don't
14 see a way to limit it just to the plaintiff states.

15 THE COURT: And do you see the need or justification
16 for a separate hearing if the impact of a preliminary
17 injunction would go beyond the scope of the 17 named
18 plaintiffs?

19 MR. RUPERT: I don't see the need for a separate
20 hearing, but we're happy to do as you'd like.

21 THE COURT: In other words, you have 17 states here.
22 We have no idea the impact that this will have on any other
23 jurisdiction or any other state.

24 Do you think it would be justified for the court to
25 postpone the effect of the nationwide impact? I know the

1 rules go into effect on March 9, but my concern is, there are
2 several other states that aren't participating, so you're,
3 basically, speaking on behalf of unrepresented individuals or
4 states.

5 MR. RUPERT: We're more than happy, if you have a
6 concern there, to invite other states to appear.

7 THE COURT: I'm asking you, do you believe that there
8 is a necessitation?

9 MR. RUPERT: I do not believe there is a
10 necessitation, Your Honor.

11 THE COURT: Well, let's talk about the scope of the
12 rule, counsel.

13 The intervenors contend -- and I'm referring to their
14 brief -- that the vast majority of rules have nothing to do
15 with 3D-firearms files, yet the plaintiffs seek preliminary
16 injunctive relief against the rules in their entirety.

17 If the court grants a relief on the specific claims, what
18 is the basis for an order enjoining implementation of the
19 rules on a wholesale basis?

20 MR. RUPERT: Just the lack of severability, Your
21 Honor. We've had discussions offline about how could you
22 narrow this injunction, or, frankly, to narrow even a final
23 order to vacating just portions of the rule. But the case
24 law is pretty clear that the court can't be rewriting
25 regulations, and that, frankly, in our opinion, is what needs

1 to occur.

2 Again, our main issue is and only issue is 3D-printed
3 guns. That's been well known to the government since 2018,
4 but yet the rule that was drafted -- and, again, as
5 Ms. Beneski said, we've just seen some of these rules for the
6 first time a month ago -- doesn't appear, on its face, to be
7 severable to just the 3D-gun issue, but we're more than
8 willing to work with parties to try to accomplish that,
9 because, as we said in our brief, our issue is 3D guns and
10 making sure that those are rightfully restricted due to the
11 severe national security interests.

12 THE COURT: One point the intervenors make,
13 counsel -- and it's on page 9 in their briefing, it says --
14 references Fredric's Arms, and the point that they make is,
15 with the regulation, they're required to register with EDTC,
16 and they have to pay \$2,250 annual registration fee, even
17 though they don't export firearms outside of the United
18 States.

19 So isn't that something that could be or should be carved
20 out, as opposed to a wholesale, overarching approach?

21 MR. RUPERT: Again, Your Honor, we're open to that,
22 but we're just looking at the remedies that the court has
23 about, you know, what portions of the rule would you vacate
24 to accomplish that.

25 Again, if a way can be crafted to accomplish that while

1 also making sure that the national security concerns related
2 to 3D guns are covered, we're more than open to anything of
3 that nature. But the reason we put it the way we did is, we
4 didn't see how you could sever the rule to accomplish, you
5 know, the issue that you just identified. Because we have
6 nothing against Fredric's Arms, as far as I know a very
7 upstanding, fine Washington business, but just given the way
8 this rule was written, as I stand here, I don't know how to
9 sever it.

10 THE COURT: Has there been any discussion or
11 negotiation with the states -- the state regarding an attempt
12 to try and craft a resolution as you propose as it relates
13 just to 3D guns?

14 MR. RUPERT: We met and conferred before filing this
15 motion, Your Honor, but here we are. I mean, we're more than
16 willing to do that. And I think -- well, I don't want to
17 speak for the government. But we and, I believe, the
18 intervenors are willing to try to craft a more narrow scope.
19 But at the end of the day, the government would need to take
20 action to rewrite parts of these rules. And there's varying
21 ways they can do that, and the intervenors have proposed
22 some, in their brief, different, creative ways that could
23 occur, but it really doesn't need to have the government
24 invested in that approach, and they'll speak for themselves
25 on that.

1 THE COURT: Do you think the settlement with the
2 defense organization prohibits or restricts the government --
3 again, they may have the answer to this question -- do you
4 think that that's the roadblock that we face right now?

5 MR. RUPERT: I don't believe so, Your Honor. It
6 doesn't seem like it would restrict them, but, again, they'll
7 have to speak on that issue.

8 THE COURT: Okay. I'm almost done, counsel. Let me
9 double-check. One last question.

10 Can you take up the government's contention that the
11 domestic distribution is already permitted under ITAR, and,
12 thus, domestic distribution can't constitute as irreparable
13 harm here?

14 MR. RUPERT: Well, I guess I would -- several
15 comments.

16 I mean, you are permitted to distribute these files in
17 person, and I believe one group has done them by mail, but
18 you're not able to post them on the Internet.

19 And I think the Fifth Circuit said it best when they
20 said that -- let me find the quote here -- "The world may be
21 awash in small arms but it's not yet awash with the ability
22 to make untraceable firearms anywhere with virtually no
23 technical skill." And that's what posting these things on
24 the Internet will do. That's why we believe this, in fact,
25 is deregulation and that -- you know, when you then have the

1 combination of it being exported, as well as, frankly,
2 available in the states, that's when this becomes widely
3 available, and it's just the issue the Fifth Circuit
4 identified.

5 THE COURT: Counsel, I believe that covers all the
6 questions that I had for the plaintiffs in this case, and now
7 I'll give you the opportunity to address any other issues
8 that you wanted to bring to the court's attention.

9 MR. RUPERT: Sure. We're flexible, Your Honor. If
10 you wanted to ask the same questions to them first, and then
11 for us to go, we will...

12 THE COURT: No, I'll come back to them. I want to
13 give you the chance to go first.

14 MR. RUPERT: Okay. Thank you.

15 Your Honor, this rule will give access to untraceable and
16 undetectable firearms to any terrorist, felon, or domestic
17 abuser with a laptop and a 3D printer. 3D guns work, they
18 are deadly, and they are undetectable via a common metal
19 detector, and that's why we're here.

20 You know, we all had to go through a metal detector to get
21 into this courtroom today. Metal detectors are commonly used
22 in courtrooms, prisons, even CenturyLink Field, where many of
23 us, locally, go to watch sporting events. This technology
24 will defeat most common metal detectors.

25 And here's what the government said -- the State

1 Department said, in June of 2015, in the *Defense Distributed*
2 litigation: "The State Department is particularly concerned
3 that plaintiff's" -- that's Defense Distributed -- "proposed
4 export of undetectable firearms technology could be used in
5 an assassination, for the manufacture of spare parts by
6 embargoed nations, by terrorist groups or guerilla groups, or
7 to compromise aviation security overseas." All those
8 concerns exist today, and nobody is disputing that the
9 national security demands that these weapons be regulated.

10 Given the limited time, I was going to focus on one of the
11 major loopholes we've identified in our briefs, and then go
12 through each of the government's responses to demonstrate why
13 we believe that major loophole exists.

14 To foreshadow, we believe that this issue of are there
15 major loopholes or not is the key factor in the case, because
16 it's going to heavily factor into likelihood of success on
17 the merits, as well as irreparable harm.

18 I was going to talk about the ready-for-insertion issue
19 that we have identified and is highlighted as the first
20 argument in Section 2 of our reply brief.

21 The ITAR has a broad definition of technical data, and
22 there is a number of CFRs that go through that, from 121.1 to
23 120.10 to yet another definition of software.

24 The rule would take all the things that are on the ITAR,
25 including this technical data that we're talking about, it

1 would move it over to Commerce.

2 The issue with Commerce is that Commerce has an exception
3 to its jurisdiction, the published exception, and that's in
4 15 CFR 734.7. So once an item is published, then Commerce no
5 longer has jurisdiction over it.

6 Now, under commerce's rules, it's quite easy to publish an
7 item. Frankly, all you need to do is put it on the
8 Internet, then it's published, and then Commerce has no
9 jurisdiction over that.

10 Well, what happened here, in the final rule, which none of
11 us saw until the final rule came out a month ago, Commerce
12 said, "Well, wait a minute. We recognize that that's going
13 to leave a big hole, because what we originally proposed
14 would allow 3D-printed gun technology to be published at will
15 on the Internet."

16 So Commerce tried to claw some of that back by
17 promulgating 734.7(c). And it's a rather bit of a mouthful
18 of a statement, but I'll read it here, and then I'll kind of
19 go through and explain some of the terms that we believe lead
20 to the glaring loophole.

21 734.7(c) talks about technology that's made available by
22 posting on the Internet in an electronic format -- and they
23 list two possibilities, such as AMF or G-code, which I'll
24 explain in a moment -- and is ready for insertion into a
25 computer-machine-controlled tool to produce the firearm or

1 the firearm frame.

2 Let me back up and say, you know, what are we talking
3 here? Because we've got AMF-code, we've got G-code, but then
4 where does a CAD file come into that? And that's what we've
5 identified in our briefing.

6 "CAD" is short for "computer-aided design." That's how
7 you go about designing quite a few things. A lot of people
8 use CAD software, and it's also used here to design the
9 pieces that are going to make the gun. The CAD software
10 itself, or a CAD file, you could not put it into a machine
11 and print a 3D gun. You couldn't print anything, for that
12 matter. Rather, there are some steps that go to converting
13 what's in CAD into something that a machine can read.

14 Specifically, there are two steps. There's AMF -- and AMF
15 is just one type of code -- and then there's G-code. I'm
16 going to go to G-code first, because that's what's
17 specifically telling the machine what to do. That's what's
18 telling the coordinates where to go and where to print the
19 item, or if it's a different type of machine, where to cut.
20 So that's G-code.

21 What we have in the intermediary is AMF, and there's
22 another popular file called STL, and we believe the rule
23 covers that, although it doesn't mention it, so it's a little
24 unclear.

25 But what AMF does is it takes a CAD file and converts it

1 into something that, at least, the machine software can read.

2 So you have three steps. You have CAD, you have AMF, and
3 then you have the G-code. So what we focused on is the CAD,
4 because the rule clearly, under its plain meaning, does not
5 cover CAD files.

6 CAD files, as I mentioned before, if you put it into a
7 machine, nothing is going to happen; rather, it needs to be
8 converted to AMF, which is easy to do. You can do it with
9 free software, or there are some proprietary programs. It
10 just takes a few minutes. It's a few clicks here and there.
11 It's very easy to do. And then with AMF -- I'm just using
12 that as an example -- that machine itself often will have
13 software that converts that to G-code.

14 Now, I'll refer you to the declaration of Dr. Patel from
15 the University of Washington. He's a computer science
16 professor that works with 3D printing regularly. He's won
17 many awards, including a MacArthur Genius fellowship. So he
18 goes through and explains what I just tried to do as well, if
19 you want further guidance there. And it's perfectly
20 appropriate for the court to consider that, particularly at
21 the preliminary injunction stage, as well as when we get to
22 the larger issue, because the Ninth Circuit has held that --
23 typically for technical matters -- the record can be
24 supplemented to address these type of items, and that's what
25 we're seeking to do with Dr. Patel's declaration.

1 So now let me go apply what I've just talked about here.
2 Here, we've got a rule that does not apply to CAD files.
3 Well, what does that mean? We know Defense Distributed has
4 CAD files. Frankly, some of them are already on the ITAR.
5 Also, for the items where they moved to AMF or G-code -- I
6 think it's, actually -- AMF is the ones that I have seen --
7 they easily can go backwards as well.

8 So the situation you could have, quite easily, is that
9 they post the CAD files online, publish it -- again, that's
10 not covered by Commerce -- then, because there's no
11 jurisdiction whatsoever once you publish something -- so you
12 put it online. You can have instructions right next to it,
13 as well as a link for free conversion software. You have the
14 AMF and G-code. In a matter of minutes -- which they said
15 they're trying to regulate, but yet they have no jurisdiction
16 over it at that point. So we see it as a glaring loophole.

17 And all the issues that we talked about at the outset,
18 from Commerce that they identified in 2015 -- excuse me --
19 State identified in 2015, of, you know, the possibility of
20 assassinations, compromising overseas air travel. They
21 become very, very real.

22 Now, let's look at the government response to this. They
23 have three general responses, other than just broadly saying,
24 Hey, you're wrong.

25 They claim -- well, first, their approach has been

1 tailored to provide Commerce with flexibility. But we don't
2 understand what that means, because when you look at the
3 plain meaning of the regulation they drafted, 734.7(c), the
4 plain meaning does not cover CAD files. So whatever they
5 mean by "tailored to provide with flexibility," perhaps it's
6 a thought that they later tried to attain some deference in
7 interpreting it, it's not going to even get there because you
8 need an ambiguity to even be able to interpret it. And this
9 rule, unambiguously, does not apply to CAD files.

10 Second, there's a very slim suggestion. It's, like, one
11 sentence in the declarations and I believe one sentence in
12 the preamble to the Commerce rule that says they're trying to
13 limit it to files that are not functional. Well, we don't
14 know what they mean by "functional," because "functional" is
15 not a term of art. It's not defined.

16 But moreover, you know, getting back to the point, it
17 doesn't change the plain meaning of the rule that we're
18 interpreting. That may have been their goal, but when we
19 look at the plain meaning of the CFR at issue, it does not
20 cover CAD files.

21 So, again, if they think they're going to be able to come
22 back later and interpret some ambiguous provision, which,
23 frankly, with, you know, post-hoc declarations, it's going to
24 be quite difficult to get any deference to that. They're
25 just not going to be able to accomplish that, because,

1 unambiguously, CAD files are not covered.

2 And the final argument that we seem to get in response to
3 our identification of this glaring loophole is that, "Well,
4 wait a minute. It's the same as the ITAR. What are you
5 complaining about? You had this issue before. You had that
6 issue with the ITAR, too." Well, not so.

7 First of all, if you look at the definitions in the ITAR
8 of "technical data," they're very, very broad. I'm
9 specifically referring to 120.10(a)(4). That's where
10 "software" is defined.

11 Moreover, under 120.10(a)(1), they pick up anything that
12 may not be software, which, here -- I'll just read it here.
13 "Information other than software, which is required for
14 design, development, production, manufacture, assembling,
15 operation, repair, testing, maintenance, or modification."
16 So the ITAR has a very broad definition.

17 But let me even go further. I'll apply it. Because, in
18 *Defense Distributed*, some of the ITAR files that they -- some
19 of the files that they regulate or that they were asked to
20 review are CAD files that are on the ITAR.

21 And, specifically, when I get to that, I'm referring to
22 the declaration of Lisa Aguirre that was filed in the Texas
23 case. Now, we filed that same declaration in our case, the
24 last case from 2018, and that's at -- the document is 1-1.
25 It's Exhibit 4 of that, which is page 31.

1 Now, Ms. Aguirre was one of the four directors of the
2 Defense Trade Control at the time. In her declaration, if
3 you look at Exhibit 3 -- so it's a little confusing. You go
4 from Exhibit 4 to Exhibit 3 --

5 THE COURT: I've got it, counsel.

6 MR. RUPERT: Okay. It's on page 65. Page 65 is a
7 request for commodity jurisdiction from Defense Distributed,
8 where they go through and identify the files that they think
9 should not be on the ITAR. And you'll see in that
10 description, in Exhibit 3, a listing of the files that
11 they're requesting not be on there and the file types. There
12 are three file types on there that are listed as CAD files.

13 So if you then go to Exhibit 6, which is page 85 of the
14 Aguirre dec- -- page 85 our of our declaration. I'm not sure
15 what it is of the Aguirre one. It's just a very brief letter
16 that says that all the items that were listed here, the
17 files, are ITAR-controlled. So when we get this idea that,
18 "Hey, what are you complaining about? This is the same as
19 the ITAR," first, if you look at the regulations, it's
20 clearly not the case, and, second, when you apply it to some
21 of the very files at issue, they're ITAR-controlled. So it's
22 difficult for us to believe that that's going to convince a
23 court that there's not a major loophole here.

24 Before I move on, there's just a final point that I want
25 to make.

1 You know, one of the reasons that, you know, we have these
2 regulations is that, if you violate them, there are criminal
3 sanctions. Can you imagine a prosecutor moving forward under
4 this type of regulation, going after CAD files with this,
5 frankly, known vagueness that even the Department admits was
6 frankly, perhaps, somewhat intentional, to give them
7 discretion to regulate it later? No prosecutor would go
8 forward on that.

9 And the result of this -- and again -- is that anyone with
10 a computer and access to a 3D printer can make a gun out of
11 plastic.

12 Now, we identify a few more in the brief, and I'm not
13 going to go through those in any detail, unless Your Honor
14 has questions, but, frankly, any one of these glaring
15 exceptions -- if any one of them is correct, and we believe
16 all of them are, the elements don't matter, because once --
17 the Fifth Circuit said once this becomes ubiquitous, then
18 what's the point of trying to regulate it further?

19 We have a moment now where we can control it, we have been
20 controlling it. Is it on the dark web in some locations? It
21 probably is, but there's so many things out there. But it's
22 not widely available, and that is what we're trying to
23 prevent.

24 I'm not going to turn specifically to the success on the
25 merits or likelihood of success on the merits.

1 Ms. Beneski started going into the notice and comment
2 issue and kind of laid the groundwork for kind of how we got
3 here, but I'll just briefly go through that again and then
4 kind of move through this argument quickly.

5 The NPRMs that came out don't mention 3D guns at all.
6 Now, we believe that's particularly significant, because
7 right when they were finalizing these NPRMs, the *Defense*
8 *Distributed* litigation was going on, and they settled the
9 case, agreeing to make rule changes. So, again, they know
10 it's an issue. They're settling the case with these rules,
11 and they don't tell the public about it at all. There's nary
12 a mention of 3D guns in this NPRM anywhere.

13 Now, to be sure, Ms. Beneski identified and as the court
14 is familiar, some expert commenters did notice; go, "Wait a
15 minute here. If you do this, you seem to be regulating --
16 deregulating 3D guns, but it wasn't widely known because it
17 wasn't clear. Were they going to make an exception to that
18 so 3D guns did not apply?

19 Well, in the way it happened, it leads to further
20 suspicion because the settlement agreement with Defense
21 Distributed is announced the day after the comment period
22 closes, a day after. And once it does, as Ms. Beneski
23 identified, a flood of emails come in, over a hundred
24 thousand, even after the comment period is closed.

25 And when you look at what you have to do for rulemaking,

1 it's pretty well known, the standards. You've got to provide
2 sufficient factual detail and a rationale to permit
3 interested parties to comment meaningfully. And if you're
4 going to make changes, they need to be a logical outgrowth.
5 We don't think either are met, for the reasons Ms. Beneski
6 said.

7 I mean, nobody truly knew that 3D guns were going to be
8 part of this rule, and they clearly knew it was an issue,
9 because they were trying to settle, and they didn't want
10 anybody to know about the settlement until after the rule
11 period -- the comment period closed. That's an issue right
12 there.

13 And then, you know, frankly, if they had just put the
14 734.7(c) out for comment, we might not be here. I mean, if
15 they truly believe now that these are a national security
16 risk, you know, that's what we have notice and comment for,
17 to identify problems with the approach.

18 You know, that's what -- we've also been talking with
19 other parties. If the court were to entertain an injunction,
20 how do we craft this so that, you know, the correct interests
21 are covered, but yet the other parts of the rule are not?
22 But, again, that's what notice is and comment is for.

23 I'm now going to move on to arbitrary and capricious, not
24 in accordance with law, kind of combine those two together,
25 because I think they really boil down to these loopholes

1 we've identified. If you agree with the States that there
2 are glaring loopholes here, I think these rules are arbitrary
3 and capricious. If you agree with the government, that they
4 are not glaring loopholes, then we lose. It's pretty much as
5 simple as that.

6 Judge Lasnik kind of had a further analysis on arbitrary
7 and capricious, and we would defer to that, unless the court
8 has questions.

9 I'm just going to move on to irreparable harm.

10 Now, again, if you agree with the States that there are
11 glaring loopholes, all the harms that the State Department
12 itself identified in 2015 are still present.

13 We've also got in the record, you know, numerous
14 declarations -- from Mary McCord, to others in our state
15 prison systems, to even the Boston Public Schools system --
16 that 3D printers are ubiquitous and kind of identifying that
17 irreparable harm, and I'll also point to Judge Lasnik's
18 decision.

19 Next, I was going to go into one of the other elements
20 necessary for injunction -- or, actually, two elements:
21 Public interest and balancing of the equities.

22 Because this is unique -- this threw me a bit because --
23 I've done a number of these cases, but to see the government
24 claim in the public-interest section that if this court were
25 to grant an injunction, it would harm national security.

1 With all due respect to the government, it's hard, on its
2 face, to take that seriously. I mean, these rules -- if
3 they're so important, these rules were proposed in 2018, and
4 they sat on them for two years. If it was so important,
5 why'd you take two years?

6 And then, moreover, you know, this declaration seems to be
7 myopic as we look to balance the equities. Yeah, I
8 understand that they want to help some of these -- you know,
9 people that are regulated, you know, to have to have, maybe,
10 perhaps, a more balanced regulatory approach, and, you know,
11 we don't dispute that. But on the other hand, we have
12 widespread dissemination of 3D-printed guns, and the very
13 problems that the State Department itself identified. So as
14 we look to balance that, you know, it just -- it seems, to
15 us, you know, it's very clear which way the balancing of the
16 equities leads in that situation.

17 The final thing I was going to discuss was severability,
18 and through your questioning, you, I think, really cut to the
19 heart of it.

20 We're open to the concept. We just don't see, in
21 practice, how a court can sever portions of this. You know,
22 if the court were to enjoin this, we're more than willing to
23 try to meet and confer to find solutions to this, but, you
24 know, we do need the government to take action, because
25 they're the ones that write regulations, not any of us.

1 THE COURT: So the bottom line is, your approach is
2 all or nothing?

3 MR. RUPERT: Unfortunately so.

4 THE COURT: Okay.

5 MR. RUPERT: Unless the court has any questions, I
6 was going to turn it over to Ms. Beneski to cover and briefly
7 go through any justiciability issues to the extent that we
8 haven't covered them before.

9 THE COURT: Okay. Thank you, counsel.

10 MR. RUPERT: Thank you.

11 THE COURT: Ms. Beneski?

12 MS. BENESKI: Thank you, Your Honor.

13 We covered much of what I wanted to discuss through your
14 questioning, so I'll keep my further comments brief.

15 The government raises three exemptions from judicial
16 review that it contends apply here. We've already talked
17 about the ECRA exemption. In addition, there's a State
18 Department regulation, which is based on a provision of the
19 Administrative Procedure Act, and then there's also the AECA
20 exemption from judicial review.

21 The AECA exemption clearly, on its face, only applies to
22 designations of items for inclusion on the Munitions List,
23 and that's, obviously, not what we're looking at here.

24 What we're dealing with here, of course, is a removal from
25 the Munitions List. And Judge Lasnik was correct when he

1 ruled that a removal is not the same as a designation, and
2 all of the cases that the government cites in its brief are
3 consistent with that interpretation.

4 So I think it's quite clear that the AECA exemption does
5 not apply here.

6 I'll also briefly address the exemption from the
7 Administrative Procedure Act under the State Department's
8 regulations, which are the 22 CFR, Section 128.1.

9 This regulation says that the administration of the AECA
10 is exempt from certain provisions of the Administrative
11 Procedure Act.

12 I just want to point out, for one thing, that the
13 government did not raise Section 128.1 in the prior case, and
14 I suspect that's because it, pretty clearly, doesn't apply
15 here.

16 We discuss Section 128.1 in detail in our reply brief, but
17 I just want to quickly highlight two points about that.

18 One is that the regulation is, apparently, much broader
19 than the statute that it's purporting to implement. The
20 statute is part of the APA. It's 5 U.S.C., Section
21 553(a)(1). That's the military and foreign affairs
22 exception, and the government does not argue in their brief
23 that that exception should apply.

24 There's, actually, quite a bit of case law on this
25 exemption from the APA, and controlling case law in this

1 circuit makes very clear that it's narrowly construed and
2 reluctantly countenanced. I think it's very significant that
3 the government did not cite any case law or other authority
4 for why that exception should apply here.

5 That's all I have, Your Honor.

6 Oh, I suppose one final comment is that the other
7 justiciability issues raised by the government: Standing,
8 political question, and zone of interests. We covered some
9 of that earlier, but all of those justiciability issues were
10 raised in the prior case and rejected by Judge Lasnik. So I
11 would refer the court to our briefing on those issues and to
12 Judge Lasnik's rulings.

13 THE COURT: Counsel will have the obvious opportunity
14 to respond to any argument made on behalf of the government,
15 but, at this point, I want to hear from the government.

16 Counsel, I'm going to begin with several questions for you
17 as well.

18 MR. SOSKIN: Thank you, Your Honor.

19 Before you get to those questions, may I just address the
20 issue of time for a moment? The parties have requested 30
21 minutes each, and I don't know how strictly the court intends
22 to adhere to that, but I do want to mention that the
23 plaintiffs have had approximately 45 minutes, at this point,
24 to answer your questions.

25 THE COURT: Well, counsel, I didn't put the clamp

1 down on you of 20 minutes, as Judge Lasnik did. So I'm
2 trying to be a little bit more liberal in terms of making
3 sure the parties have the opportunity to fully address the
4 issues. If it starts to get too extensive, the court will
5 certainly cut you off at that point, but right now, I want to
6 make sure you have a full chance to respond. All right?

7 MR. SOSKIN: Thank you, Your Honor.

8 THE COURT: So with that, counsel, the first question
9 I have for the plaintiffs in this case is, from my
10 understanding of your briefing, there is no opposition to the
11 intervention of the NSSF; is that correct?

12 MR. SOSKIN: That's right, Your Honor.

13 THE COURT: All right. And with respect to the
14 issues of standing and jurisdiction, what's different now
15 compared to when you were before Judge Lasnik? Same question
16 I asked counsel for the plaintiffs.

17 MR. SOSKIN: Yes, Your Honor. The reality is, there
18 are numerous differences between this case and the *Defense*
19 *Distributed* settlement case. It is true that they are
20 related under the local rules, but the provisions of the
21 local rules that indicate they are related are not
22 dispositive of questions like standing and jurisdiction.

23 The two key differences here are that, one, that case
24 involved a challenge to a discrete settlement agreement that
25 involved no process, public or otherwise, other than the

1 settlement agreement between the parties. And Judge Lasnik
2 was understandably concerned, and it is reflected in his
3 opinions, although we disagree with those opinions, that
4 there was no notice to Congress under the removal provision
5 of the AECA, that there was no public notice and comment, and
6 that the agency had not issued a public analysis of the
7 effect on national security and those types of interests.

8 All of those things have occurred here. It is clear from
9 those opinions that what Judge Lasnik anticipated was the
10 U.S. government would go back, and it would consider these
11 under the appropriate process, which has now been done.

12 The second key difference is that, there, all the parties
13 agreed that the effect of the settlement was to deregulate
14 Defense Distributed files. Here, the government has
15 regulated those files. So the disagreement is stark, and it
16 is about this underlying legal question of whether the files
17 are now regulated in the new rule, and that implicates all of
18 the issues of APA preclusions and preclusion of judicial
19 review and political question that the plaintiffs try to
20 bypass simply by saying that Judge Lasnik didn't find those
21 present. But the reason he didn't find those present is that
22 the circumstances were very different.

23 For example, the 2778(h) preclusion of judicial review
24 provision in the AECA says that precludes judicial review of
25 designations in regulations. There were no regulations at

1 issue in the *Defense Distributed* settlement case, and so,
2 therefore, that statutory provision wasn't one that the
3 United States sought to rely on and wasn't one that the
4 United States briefed.

5 That case also did not involve the ECRA/APA exclusion,
6 which you asked a question about earlier. And so the
7 question of whether a review of the Commerce Department's
8 conclusions could be conducted under the APA, consistent with
9 the ECRA's APA exclusion of ECRA functions from the APA, was
10 simply not at issue.

11 THE COURT: All right. Let's transition a little
12 bit, counsel. I want to talk to you about public comment, a
13 topic I've already addressed with plaintiffs in this matter.

14 Do you have totals on the number of public comments
15 received related to 3D guns before and after the settlement
16 agreement was revealed? I'm trying to get a number of public
17 comments. There's been representations of a large volume of
18 emails, essentially, protesting, which was over 100,000. But
19 I'm trying to get from you, from your perspective from the
20 record, what is the volume of public comments received.

21 MR. SOSKIN: Your Honor, I don't have those numbers,
22 but the public comment numbers during the public comment
23 period on the NPRM, the public comments were significant, and
24 they included comments from organizations like the amicus
25 here, the Brady folks, who, I believe, specifically addressed

1 in their comment, the regulation of 3D-firearm files issue.

2 But as to numbers, I don't know what those numbers are.

3 I do know the 110,000 emails, I believe, included a large
4 number of, essentially, identical emails that you submitted
5 by clicking a button on a website to send a form email, and
6 then, in fact, the parties in the *Defense Distributed*
7 settlement case reached an agreement to not produce tens and
8 tens and tens of thousands of identical emails as part of the
9 administrative record.

10 THE COURT: Counsel, since you raised the amicus
11 brief, one of the things pointed out in the submissions is,
12 they referenced a case called *Natural Resource Defense*
13 *Council v. EPA* regarding the notice requirements of EPA.
14 And, there, they say the essential inquiry focused on whether
15 interested parties could have anticipated the final
16 rulemaking from the draft proposal.

17 Now, with this consideration of the new provision, which
18 will be codified under 15 CFR, Section 734.7(a), where does
19 the substance or text of 734.7(c) appear in the State and
20 Commerce's rulemaking?

21 Now, these are points which were raised in the amicus
22 brief, so I just wanted to give you a chance to respond.

23 MR. SOSKIN: So to go to the question of notice, it
24 is black letter law -- and we cite the cases in our brief --
25 that a final rule that addresses comments raised in response

1 to the NPRM may introduce new provisions that are designed to
2 address those comments, as the rule did here. Comments, as
3 well as commentators, Congress, the plaintiffs here in the
4 prior litigation, raised concerns about the publication of
5 3D-firearms files on the Internet. And between those outside
6 commentators and the comments themselves, it is a reasonable
7 response, under that case law, for the agency to adopt a
8 provision to address those concerns, as 734.7(c) does here.

9 The specific text was not available for public comment,
10 and the United States does not dispute that that public text
11 was not available.

12 THE COURT: Where does notice of proposed rules
13 reference 3D guns anyplace?

14 MR. SOSKIN: Your Honor, the regulation of technical
15 data has always been understood to be a function of the
16 regulation of the underlying -- the underlying items
17 themselves.

18 So when, in earlier rounds of the Export Control Reform
19 Initiative, defense articles were transferred from State
20 control to Commerce control, the technical data for those
21 items, along with 3D files for printing those items, was
22 transferred.

23 The United States Munitions List simply
24 doesn't make distinctions and doesn't make references to
25 various methods of manufacturing the articles on the list.

1 And the commentators who commented on the 3D firearms, as a
2 result of the NPRMs, correctly identified this principle,
3 which is an overarching principal in the USML, and it's
4 apparent to anyone who is involved with the regulation of
5 exports of arms and defense articles under the USML, that
6 technical data, such as files for 3D printing, goes with and
7 is part and parcel of the regulation of the underlying items.

8 THE COURT: Again, counsel, I point to the amicus
9 brief. They reference the fact that you can't point to
10 anywhere where, prior to the publication of the final rules,
11 the agencies gave any indication it would develop specific
12 regulations to address online dissemination of technical
13 information related to 3D-printed guns.

14 MR. SOSKIN: Because those were a response to the
15 public comments that were received by commentators who
16 correctly identified the issue, because that is how the
17 USMIL, in its nature, works.

18 THE COURT: And, counsel, if I asked you to cite
19 public comments regarding the new 734.7(c), what record could
20 you make?

21 MR. SOSKIN: For public comments about the new
22 734.7(c)?

23 THE COURT: Yes.

24 MR. SOSKIN: I believe that's implicit in my earlier
25 answer; that that text was not made available.

1 THE COURT: All right. Let me see if I have more
2 questions for you, counsel.

3 I know you cross-referenced this a little bit, counsel,
4 and it's dealing specifically with your brief at Footnote 22.

5 You contend that the same administrative record applies as
6 it was in the previous case before the court. Even if you
7 disagree, are you saying that the government's prior findings
8 therein should be afforded less weight?

9 MR. SOSKIN: Your Honor, I'm not sure I understand
10 your question. It was plaintiffs who contended that the same
11 administrative record would apply, not defendants.

12 THE COURT: What is your position on that argument,
13 counsel?

14 MR. SOSKIN: The administrative record that was
15 produced before may well be a portion of the administrative
16 record here. However, there is reason to think it may not be
17 so limited.

18 We have not developed an administrative record here, but
19 these are new -- these are the final rules, and in the
20 development of those final rules, there have, obviously, been
21 changes versus the NPRMs, otherwise we would not be here
22 today, and so the administrative record would not be
23 identical, we would expect.

24 THE COURT: And counsel has already referenced this
25 to some degree.

1 Less than two months before the NPRMs were published, the
2 State Department had taken the position that 3D-printed
3 weapons posed unique threats to world peace, national
4 security, and the foreign policy of the United States. The
5 agency's specific concerns regarding the proliferation of
6 these weapons are well documented in the administrative
7 record.

8 Now, you say new decisions were made to adopt the final
9 rules. My specific question deals with what specific
10 findings were made that the 3D files no longer posed the same
11 national threat risk that caused the government to repeatedly
12 say it warranted control under ITAR?

13 MR. SOSKIN: Respectfully, Your Honor, I believe the
14 premise of your question suggests that there was a finding
15 made by the government that was not made.

16 In fact, the final rules reflect that the State Department
17 and the Commerce Department concluded not that there was no
18 impact on national security of 3D-firearm files being posted
19 on the Internet, but rather that Commerce, by regulating the
20 dissemination of such files on the Internet by retaining EAR
21 jurisdiction over the posting of such files, would address
22 the national security concerns that did exist.

23 THE COURT: What evidence or findings were made at
24 the time of the final rules to contradict or disprove these
25 prior findings as warranting control under ITAR?

1 MR. SOSKIN: Well, Your Honor, I, again, have a
2 similar answer, which is that the findings that were made by
3 the State Department, the Commerce Department, and I should
4 mention the Defense Department in this process were that the
5 EAR controls that were implemented in the final rule would
6 address those national security concerns, not that they
7 would -- that those national security concerns did not exist.
8 There's nothing contradictory about that position.

9 THE COURT: What evidence or findings were made --
10 and, again, I keep coming back to the issue of findings were
11 made -- at the time of the final rules, that this new scheme,
12 under Commerce, would facilitate the maintenance of global
13 export controls and nonproliferation regimes as it pertained
14 to these particular files?

15 MR. SOSKIN: Well, Your Honor, those findings are, on
16 their face, in the final rule themselves, which contain State
17 and Commerce's high-level evaluation of those items. The
18 senior decision-makers in the agencies made the decision to
19 proceed with this transfer, as modified, and in the process,
20 they reviewed available information and concluded that the
21 final rules would maintain world peace and facilitate
22 national security and foreign policy.

23 And, of course, those decisions about how the final rules
24 would affect world peace, national security, and foreign
25 policy are precisely the kinds of questions that, in our

1 threshold arguments, both statutory and constitutional, we
2 suggest are not open to judicial review.

3 THE COURT: Is it not true that the incentives of the
4 two agencies differ? In other words, one of the amicus
5 briefs points out the Commerce Department weights commercial
6 interests more heavily than does the State Department. So
7 how is it, despite divergent policy goals, that enforcement
8 will be the same?

9 MR. SOSKIN: Well, Your Honor, as the declarations of
10 the three deputy assistant secretaries, two at State and one
11 at Commerce, explain, as a practical matter, enforcement will
12 be at least as effective, if not more effective under
13 Commerce control, and that is because State, understandably,
14 focuses its enforcement efforts on items of critical military
15 or intelligence advantage, on aircraft carriers and the
16 coatings for submarines and ICBM guidance assistance.

17 Commerce is much more experienced in maintaining and
18 enforcing regulations as to the kinds of items that are found
19 domestically among the public in the United States. And to
20 that end, Commerce has domestic, United States, has federal
21 law enforcement officers who enforce the EAR. State does not
22 have its own law enforcement officers enforcing the ITAR and
23 must rely on other federal law enforcement agencies to do it.

24 So through transfer, there is ample reason to believe that
25 enforcement will be at least as effective, if not more

1 effective, and there's more detail on that in Deputy
2 Assistant Secretary Hassebrock's declaration.

3 THE COURT: Now, currently under ITAR, those who
4 engage in manufacturing defense articles are required to
5 register and undergo a background check, et cetera. These
6 protections are not afforded at Commerce.

7 If that's correct, doesn't it stand to reason that the
8 government would lose valuable information about who is
9 engaged in exporting these items?

10 MR. SOSKIN: Your Honor, the licensing arrangements
11 are not an issue that, I believe, plaintiffs have raised in
12 this litigation, and the focus here has been on the
13 unrestricted Internet posting of 3D-firearm files.

14 There are a lot of details to licensing arrangements, but
15 one thing I would note about export licensing under the EAR
16 is that the EAR continues to maintain jurisdiction over
17 U.S.-origin items, even after they have been exported, and is
18 able to maintain and enforce post-export regulations very
19 effectively through the kinds of conditions it puts on other
20 exports under the EAR.

21 So if someone to whom a 3D-firearms file was exported
22 under a license or otherwise were to post it on the Internet,
23 Commerce would still have the ability to enforce 734.7(c)
24 against them through the mechanism of making them, for
25 example, ineligible for future exports of EAR-regulated

1 items.

2 THE COURT: I think counsel for the plaintiffs'
3 argument was that, essentially, once this publication occurs,
4 Commerce loses control.

5 MR. SOSKIN: Your Honor, that goes to the principal
6 misunderstanding that the plaintiffs show of the ITAR and EAR
7 regimes.

8 Once an item is in the public domain under the ITAR, the
9 ITAR does not control that item. And the definition of
10 public domain, in the ITAR itself, references -- includes the
11 word "published," and as the declarants explain here, the
12 scope of the exception for published information, under the
13 EAR, and public domain information, under the ITAR, is
14 coextensive once the new regulation on Internet posting of
15 3D-firearm files is taken into account; that is, the
16 principal gap before the new addition to the EAR was simply
17 that items could be published on the Internet -- could become
18 published by posting on the Internet without prior approval.
19 In the State regime, that would not place them in the public
20 domain. Under the EAR, it would have placed them in the
21 public domain. But now, because of the new subpart that has
22 been added to 734, that has changed. They would no longer be
23 considered published when in that posture.

24 Plaintiffs, in their reply brief, posit that any kind of
25 placement into the public domain requires government

1 pre-approval, and that's simply not true.

2 There is one specific subpart in the ITAR's public domain
3 definition that refers to pre-approval by a relevant
4 government agency. None of the other subparts do, and
5 because they do not, the public domain and published
6 exceptions are coextensive.

7 THE COURT: Counsel, just out of curiosity, were
8 there any studies conducted on prior transfers from the USML
9 to CCL? Were there any prior studies?

10 MR. SOSKIN: I'm sorry. I don't really understand
11 what you're asking for.

12 THE COURT: Were there any studies conducted about
13 transfers?

14 MR. SOSKIN: Do you mean were there NPRMs that were
15 published before they were done?

16 THE COURT: Yes.

17 MR. SOSKIN: Yes, in many of the cases. I believe
18 there were 21 NPRMs and 26 final rules that have been
19 published as part of the ten-year process.

20 THE COURT: Counsel, I'm referring now to your brief,
21 specifically at page 27, note 21.

22 What evidence is there to support your statement in the
23 briefing that the existence of more enforcement agents under
24 Commerce would result in a non-proliferation of arms,
25 especially in light of the prior concerns that these types of

1 arms would be virtually undetectable?

2 MR. SOSKIN: Well, Your Honor, as I think I answered
3 in your previous question, having a domestic law enforcement
4 agency who is tasked with enforcing, among other things, the
5 EAR, gives Commerce a capability to monitor and enforce
6 against unregulated exports in a manner that State doesn't
7 have a comparable capability to. And so those law
8 enforcement agents are a resource that would be available
9 under the final rule for enforcement against precisely the
10 kinds of harms that plaintiffs posit would occur and that are
11 not available under continued ITAR regulations.

12 THE COURT: Counsel, you say "law enforcement
13 agents." Help me visualize what the enforcement would look
14 like and under what the circumstances would be.

15 MR. SOSKIN: Your Honor, I don't have familiarity
16 with precisely how Commerce's law enforcement agents do their
17 job. I know there is a general description of Commerce's
18 enforcement activities that can be found in the Hassebrock
19 declaration.

20 THE COURT: And I've talked you to about findings
21 before, and if you've already answered this question, you can
22 just merely represent that to the court.

23 What findings are there that the types of 3D files here
24 are or were available before the agency deregulated them on
25 July 27, 2018, or is it just that these underlying types of

1 firearms are widely available?

2 MR. SOSKIN: Well, Your Honor, again, I do want to
3 make clear that there is a nuance in your question here, and
4 your question supposes that, on July 27, 2018, they were
5 actually deregulated. However, our understanding of the
6 effect of Judge Lasnik's temporary restraining order, then
7 preliminary judgment, then final judgment in that action is
8 that those Defense Distributed files have never been
9 deregulated, and that is how State treats them under ITAR,
10 and that point is addressed by both Deputy Assistant
11 Secretary Borman and Deputy Assistant Secretary Miller.

12 THE COURT: And wouldn't the final Commerce rule, as
13 the States contend, permit publishing by other means that
14 would take it out of Commerce's jurisdiction before it could
15 then be published online?

16 MR. SOSKIN: Well, Your Honor, the EAR is no
17 different than the ITAR in that regard; that if a matter is
18 published in a book, it becomes outside the jurisdiction of
19 the ITAR, and it becomes outside the jurisdiction of the EAR.

20 If a matter is published in the public library, a library
21 accessible to the public, it falls outside the jurisdiction
22 of the ITAR and outside the jurisdiction of the EAR, and I
23 could go through the list of how those exemptions are
24 comparable.

25 THE COURT: All right.

1 Where in the record is the justification for Commerce
2 treating online publication of 3D files differently than
3 other forms of publication as it relates to national
4 security?

5 MR. SOSKIN: Your Honor, the treatment of online
6 posting of files on the Internet is motivated by the agency's
7 response to the public comments, and the interest of other
8 commentators that were expressed during the rulemaking, that
9 posting on the Internet was something that Commerce should
10 seek to address in its final rule, and it did.

11 THE COURT: Now, counsel, I want to talk about
12 irreparable harm and injunctive relief. These are the last
13 area of questions I have before I give you the opportunity to
14 add to the record that you've already made.

15 My first question, same as I asked counsel for the
16 plaintiffs. I'm concerned about the scope of injunctive
17 relief that's being requested, and my concern is, is there a
18 need for a separate hearing to address the scope of any type
19 of injunctive relief, if the court were to grant an
20 injunction?

21 MR. SOSKIN: Well, Your Honor, if the court were to
22 conclude that there is some infirmity in the scope of
23 coverage of the final rule, such that an injunction was
24 warranted, we would welcome the opportunity to submit to the
25 court a description of how such an injunction could be more

1 narrowly tailored than to the entirety of the rules.

2 I don't think that a hearing would necessarily advance
3 that process.

4 THE COURT: Okay.

5 And the government argues that it's going to suffer harm
6 to national security if an injunction issues. Wouldn't an
7 injunction just maintain the status quo?

8 MR. SOSKIN: Your Honor, there is an ongoing harm, as
9 Deputy Assistant Secretary Miller describes, from having the
10 focus of State's activities to enforce the ITAR, diverted to
11 the large number of license applications by, for example,
12 members of National Shooting Sports Foundation and by all
13 sorts of other exporters, and that diversion and focus
14 prevents the Department of State from fully carrying out the
15 mission of the Export Control Reform Initiative, which is to
16 focus on protecting those items critical to the military or
17 to intelligence. And the President and the Secretary of
18 Defense, as reflected in our declarations at the time this
19 initiative was begun, recognized that that diversion was
20 harming national security by preventing our ability to
21 protect crown-jewel items.

22 That harm remains as long as this large category of items
23 in Categories 1, 2, and 3 remain regulated by State.

24 THE COURT: And how would the U.S. suffer harm if the
25 rules aren't even in effect yet, counsel?

1 MR. SOSKIN: Your Honor, the rules themselves will
2 mitigate the harm to national security that is caused by an
3 overly broad USML that requires State to spend its precious
4 enforcement efforts and its licensing efforts focused on
5 low-value items that do not cause -- that do not represent a
6 critical military or intelligence advantage; items like a
7 Smith & Wesson revolver that can be widely purchased in the
8 United States, and, in fact, items like the barrels for
9 firearms, which are completely unregulated as a matter of
10 federal law, and that, as a matter of the Gun Control Act,
11 can even be purchased by felons and the mentally ill and
12 children because they're not considered even firearms at all
13 under federal law.

14 THE COURT: And, counsel, just a couple more
15 questions.

16 You argue on the one hand that it doesn't spend much time
17 monitoring technical data, but that national security would
18 suffer if the rules aren't implemented.

19 Aren't these inconsistent positions?

20 MR. SOSKIN: So, Your Honor, there is a footnote in
21 Deputy Assistant Secretary Miller's declaration that
22 addresses this precise point. I believe it is Footnote 20,
23 and that distinguishes between those enforcement activities
24 where State has discretion of what to pay attention to and
25 its licensing activities where it must act on the license

1 applications that come to it.

2 And so the mandatory activities to respond to licenses,
3 particularly in this area, an area that is a major United
4 States industry that has numerous players in it and which has
5 hundreds of millions of dollars of exports literally sitting,
6 awaiting licenses to be issued by Commerce under the new
7 rules, all of those mandatory activities have to be carried
8 out by State, no matter how they focus their enforcement.

9 However, as to enforcing unregulated exports, unlicensed
10 exports, that is an area where State must choose how to
11 dedicate its attention.

12 THE COURT: Last question, counsel.

13 Would the modified injunction that is covering technical
14 data for arms capable of 3D printing pose the same risk to
15 national security?

16 MR. SOSKIN: Is your question would there be national
17 security harms to a modified injunction?

18 THE COURT: Yes.

19 MR. SOSKIN: I think that would depend on what the
20 scope of the modified injunction would be, and so I can't
21 address that in the abstract.

22 Obviously, the greater the burden, the more things State
23 is required to do under an injunction, the less the purpose
24 of the transfer can be fulfilled and the greater the harm to
25 national security.

1 THE COURT: All right. Counsel, let me make sure
2 I've asked all my questions.

3 Okay, counsel, I'll give you the opportunity to make your
4 arguments to the court and supplement the answers you've
5 already provided.

6 MR. SOSKIN: There are a few points that I would like
7 to highlight to the court, because I think they're important
8 for the court to understand in considering this case.

9 First, there are, really, three questions here before the
10 court. These are, will there be any significant change in
11 the regulation of 3D-firearm files when the new rules go into
12 effect? And the answer the government proffers is no.

13 The second question is, are the State and Commerce rules
14 subject to the APA? And we think, plainly, the answer is no.

15 And third is, if they are subject to the APA, does the
16 court have jurisdiction to hear plaintiffs' challenge? And
17 the answer there is also no.

18 And if the court agrees with us on any of those questions,
19 plaintiffs' motion must be denied.

20 As to the first question, will there be any significant
21 change to the regulations? Plaintiffs' reply, I think, is
22 particularly important because it shows the extent to which
23 plaintiffs are bereft of understanding about the ITAR system
24 and the EAR regime.

25 What they don't seem to understand is that, under both

1 systems, export controls are not being applied to 3D-firearm
2 files that do not automatically generate defense articles,
3 and second, that under both systems, ready-to-use 3D-firearm
4 files will be subject to controls and can't be published on
5 the Internet.

6 To understand that involves looking at both the comparison
7 between the published and public domain exceptions, which I
8 think we discussed before in answer to one of your questions,
9 and, there, I want to focus the court's attention on their
10 biggest error, as reflected in their reply brief.

11 Plaintiffs appear to believe that the ITAR requires
12 government pre-approval before any technical data goes into
13 the public domain. In their world, the government must
14 pre-approve every newspaper and magazine article that
15 discusses a technical or scientific subject under the ITAR.

16 In their world, government approval is required to place a
17 book into the public library, unless that library is closed
18 to foreigners. And governmental approval is required to
19 present on technical matters at every conference and trade
20 show in America, and that simply is not a correct reading of
21 22 CFR 120.11(a)(7), the place where the government-approval
22 requirement appears. That is only one subsection of the
23 public domain requirement.

24 And as to this point, the plaintiff, in one of the cases
25 we cite, the *Stagg* case out of the Southern District of New

1 York, made the same claim, and it was roundly rejected there.
2 I encourage the court to look at the analysis by the *Stagg*
3 court. It explains why this is not a correct reading of
4 120.11, and the court -- and State follows the reading that
5 the court applied to that provision.

6 In the real world, which State and Commerce know about
7 because they have expertise in how their regulations are
8 applied and administered, published and public domain have
9 been coextensive, except for the
10 published-by-virtue-of-posting-on-the-Internet exception that
11 appears in the EAR and does not appear in the ITAR.

12 And the explanation for many of the questions the
13 plaintiffs have raised and that the court has raised of why
14 that is the solution that is introduced in the final rule is
15 that when commentators raised concerns about posting on the
16 Internet, they pointed to the fact that items would become
17 published if posted on the Internet under the existing
18 Commerce provision.

19 So Commerce crafted and adopted the new subsection C that
20 prevents publishing -- prevents posting on the Internet from
21 making something published. And because posting on the
22 Internet does not make something published, it does not
23 matter when the posting on the Internet occurred under the
24 plain-text reading of that subsection.

25 So the mere fact that Defense Distributed published its

1 files on the Internet for a couple of days before Judge
2 Lasnik entered his injunction does not defeat the application
3 of the rule.

4 And the declaration of Deputy Assistant Secretary Borman
5 explains precisely that and says those Defense Distributed
6 files will continue to be regulated under the new rule.

7 One more point on public domain versus published. Here is
8 the definition of public domain as written in the ITAR before
9 the enumeration of things like newsstands, bookstores,
10 libraries, et cetera.

11 It says, "Information which is published and generally
12 accessible or available to the public." It could not be made
13 more clear than by that piece of the ITAR how closely
14 "published" and "public domain" parallel each other, and yet
15 the largest issue on which plaintiffs point to is this
16 question of a pre-approval for publication.

17 The other key piece is 734.7(c) itself. They claim that
18 the text is -- the text is unambiguous and limited to AMF and
19 G files. But in their reading, they are reading out the two
20 keywords, "such as." 734.7 (c) says that it applies to files
21 that are in "an electronic format such as AMF files or G
22 files," and then it says, "that are ready for insertion."

23 So AMF and G files do not limit it in such a way that they
24 exclude CAD files. That is a reading of the statute that is
25 not compelled by the statute and is not correct. As the

1 declaration of Deputy Assistant Secretary Borman makes clear,
2 CAD files are well within the scope of what 734.7(c) permits
3 Commerce to treat not as published, based on posting on the
4 Internet.

5 Now, in their brief, they argue about what the plain
6 meaning of the word "ready" is, and I believe they cite to --
7 well, I'm not sure what they cite to, but here is the
8 relevant portion of the definition of "ready" from the Oxford
9 English Dictionary: Ready as to a process or event, like
10 "ready for insertion" means it happens quickly or easily.

11 And so plaintiffs' hypotheticals, which involve files that
12 are in some format that come with instructions right
13 alongside them on how to turn them into files that
14 automatically generate a 3D firearm, easily fall within the
15 interpretive scope of "ready for insertion," just as they
16 fall into the category of "electronic format such as."

17 Plaintiffs eloquently describe a laundry list of things
18 that are regulated as part of the technical data definition
19 of the ITAR, but what is important to understand is that the
20 instructions for how to make a firearm or firearm components
21 or firearm receiver, in general, are widely available, widely
22 known, and in the public domain, as ITAR treats them.

23 So the key thing to look at is not the definition in ITAR;
24 it's to look at how State has treated similar circumstances.
25 For example, how has State treated 3D-firearm files that were

1 brought before it? And when Defense Distributed submitted a
2 batch of 3D-firearm files for a commodity jurisdiction
3 determination, State concluded that only those files that
4 could be used to automatically generate 3D firearms were
5 subject to ITAR jurisdiction.

6 I don't know about you, but "used to automatically
7 generate" sounds very similar to "ready for insertion," and,
8 in fact, I believe that "ready for insertion" is plausibly
9 broader than "used to automatically generate," bearing in
10 mind that "automatically generate" doesn't necessarily set
11 some outer bound, it's how State described what it was doing
12 with respect to Defense Distributed's files.

13 And, again, as the agency declarants make clear, those
14 same files, whether you label them "CAD files" or "used to
15 automatically generate files" will be regulated under the new
16 EAR provision. They are not being treated as published, and
17 thereby exempt from Commerce jurisdiction.

18 Why did State limit to "files that could be used to
19 automatically generate"? Because the key step that Defense
20 Distributed's files had was that. That is the only way in
21 which State assessed they had gone beyond what was previously
22 available in the public domain or that should be regulated.

23 There's one more piece of 734.7(c) that I want to point
24 you to.

25 Plaintiffs have focused heavily on 3D-printed firearms

1 files, and they make light of our response, which is that
2 734.7(c) is intended to provide flexibility for new
3 innovations in technology. I point you to the fact that that
4 exception specifically addresses computer numerically
5 controlled manufacturing, which can involve, essentially, the
6 opposite of 3D printing; an automated computer-generated
7 device that takes a block of metal and cuts it down to make a
8 firearm instead of a technology that is building something up
9 layer by layer. Those kinds of tools are also
10 specifically -- the files for those tools that can be used --
11 that are ready for insertion into those tools, are also being
12 covered by the new 734.7(c) rule here and is a way in which
13 it is effectively addressing a threat that plaintiffs don't
14 bother to really address in their briefing or in their
15 complaint.

16 There's one other example worth looking to, and that is in
17 the *Karn* case, Your Honor, and I think this helps highlight
18 the ready-for-insertion issue.

19 In that case, which is from D.D.C, and I believe it's
20 1996 -- it's cited in our briefs -- State, there, was
21 presented with the opportunity -- the commodity jurisdiction
22 question under the ITAR of how to regulate cryptographic
23 source code. And, there, a book was presented, I believe, in
24 the request. There was a book, and there was a diskette in
25 the back, and in the book was written out, in text

1 characters, the source code for cryptography, a method of
2 encrypting files, and exactly the same text appeared on the
3 diskette, and State said the text, as it's found in the book,
4 is in the public domain. The same text, because it's on a
5 diskette, is regulated by the ITAR, and it rejected, in the
6 question of whether this was covered by the ITAR, the
7 possibility that, because you could take a computer scanner
8 and scan the pages from the book into a PDF and then copy
9 them into an electronic file, State said, Well, as we
10 understand the ITAR and its exemptions, that's not enough.
11 Those additional steps mean that it is not something that
12 falls into ITAR jurisdiction.

13 The importance of that is to show that, although
14 plaintiffs posit that there is this vast universe of
15 3D-printing information that State is regulating under the
16 ITAR, the actual examples of how State regulates files like
17 these are very close to how Commerce will be regulating them
18 under the new rule.

19 I just want to touch briefly on a couple of the APA-review
20 arguments.

21 THE COURT: Counsel, how much additional time do you
22 think you need to do this?

23 MR. SOSKIN: I believe I can cover this in about
24 three to five minutes, Your Honor.

25 THE COURT: Please proceed, and then we'll take our

1 morning recess.

2 MR. SOSKIN: The court does not need to look beyond
3 the text of the statutes, which are unambiguous here.
4 50 U.S.C., 4821 exempts all ECRA functions from the APA's
5 provisions, and it uses the language "shall not be subject to
6 those provisions of the APA," and it has two specific
7 exceptions in there, neither of which exception is, Well, if
8 an agency action is blended together with an action of the
9 State Department, then you can review Commerce's actions
10 through some applicable exemption under State.

11 No. The approach that plaintiffs posit this court
12 applying would subject Commerce's decisions to the APA in
13 direct derogation of that provision of the ECRA. And this is
14 not -- this is a -- if Congress intended that result, it
15 would be a meaningful oversight, because Congress enacted the
16 ECRA in 2018, fully aware of the fact these joint rules to
17 transfer items from ITAR to -- from the USML to the CCL have
18 been going on -- at that point had been going on for eight
19 years and that they had not been subject to judicial review,
20 and that doing so was specific to -- was in furtherance of a
21 specific congressional command that, in the administration of
22 the ITAR, State is commanded to review -- well, the President
23 is, but it's been delegated to State -- to review and propose
24 for removal those items that no longer belong.

25 And that gets to the 22 CFR 128.1 interpretation, a

1 textual interpretation that plaintiffs raise. They say,
2 Well, that exception is only about the administration of the
3 ITAR. But the administration of the ITAR includes that
4 provision, 20, I believe it's sub-provision F, which says you
5 shall review and propose for removal those items that
6 shouldn't be there.

7 The one other point I want to make on this is that
8 "designate" doesn't mean what plaintiffs would have you
9 believe it means.

10 Their brief cites to an online version of Webster's
11 Dictionary, but I took a look at *Webster's New Collegiate*
12 *Dictionary* from 1987, the print version that is
13 contemporaneous to the enactment of 2778(h). And in the
14 contemporaneous dictionary, it says that "designate" means
15 not to add, as plaintiffs would have you believe, but to mark
16 or point out, to indicate, to show, or to specify. These
17 mean, if you follow their definitions, to enumerate, as in
18 the items contained in a list, and that's what this
19 regulation that they are challenging on the State side is.
20 It is an enumeration of the new listing of what is on the
21 USML.

22 And the fact that Congress intended this to be precluded
23 from judicial review is made clear by the legislative history
24 that we cite, that they never respond to, where, in enacting
25 2778(H), Senator Riegle said that this is specifically

1 intended to preclude review of the question whether an item
2 should be on the USML or on the CCL.

3 That is the gravamen of plaintiffs' complaint, that this
4 should be on the USML, not on the CCL. Congress intended to
5 exclude precisely this challenge in 2778(h).

6 THE COURT: All right. Thank you, counsel.

7 We're going to take our morning recess, and when we return
8 back, I'll give the intervenors an opportunity to make any
9 supplemental argument beyond what I think has already been
10 covered by the questioning of the court to plaintiffs and
11 defense, but I do want to give you the opportunity to make
12 brief remarks, and then I'll come back to counsel for the
13 petitioners.

14 And, counsel, just so you know that I didn't short shrift
15 you, you had about 48 minutes in your presentation to the
16 court, so I think that's as close to a generous
17 balance-of-time allocation that the court can provide.

18 MR. SOSKIN: Thank you, Your Honor. I appreciate the
19 time.

20 THE COURT: We'll take our recess for 15 minutes, and
21 then we'll resume.

22 (Court in recess.)

23 THE COURT: Mr. Glover, I didn't mean to sidestep
24 your opportunity, but I assume your co-counsel made all the
25 points you were going to make?

1 MR. GLOVER: Your Honor, with your leave, I need
2 about 60 seconds.

3 THE COURT: I have lawyers tell me all the time.
4 What's realistic?

5 MR. GLOVER: Maybe 60, possibly 90, unless you have
6 questions for me.

7 THE COURT: Go ahead.

8 MR. GLOVER: My colleague referenced Mr. Miller's
9 declaration for the effect that Commerce has certain things
10 they have to do, so all -- sorry -- State has certain things
11 they have to do, so all they need to do is make
12 registrations. That's in the declaration at paragraph 100,
13 Footnote 8, the declaration of Mr. Miller.

14 THE COURT: Okay.

15 MR. GLOVER: As then as to Commerce's law enforcement
16 functions, I would also point you to the declaration of
17 Mr. Hassebrock at paragraph 26.

18 THE COURT: At page 26?

19 MR. GLOVER: At paragraph 26.

20 THE COURT: Okay. All right.

21 MR. GLOVER: And then the only point I was going to
22 make: You asked my colleague about how the government would
23 be harmed if the injunction merely kept the status quo, and I
24 just wanted to point out that the proper, I guess,
25 perspective to look at it would be, if you allow the rule to

1 go into effect, the power transfers, and that's why there's
2 some efficiencies by State not having to address all of the
3 items that will be transferred to Commerce, and Commerce
4 being able to --

5 THE COURT: Slow down.

6 MR. GLOVER: -- law enforcement --

7 THE COURT: I know you're trying to get it done,
8 counsel, but you need to slow down.

9 MR. GLOVER: Apologies.

10 So the proper perspective would be, what's the harm to the
11 government from today or from the issuance of an injunction
12 as compared to letting the rules go into effect?

13 That was all I had.

14 THE COURT: Okay.

15 MR. GLOVER: Thank you.

16 THE COURT: I didn't want you to fly all the way back
17 to D.C., counsel, without you having the opportunity to, at
18 least, say something in court. You can justify your plane
19 ticket with 90 seconds, counsel.

20 All right. Mr. Shah?

21 MR. SHAH: Good morning, Your Honor. May it please
22 the court. Pratik Shah for the intervenors.

23 I think the one thing that's become crystal clear after
24 the briefing, and certainly after the argument today, is that
25 plaintiffs' claims are limited exclusively to the rules'

1 treatment of files for 3D-printing of firearms, a tiny, tiny
2 slice of a pretty massive regulatory transfer of many items.

3 In the event the court finds merit in the plaintiffs'
4 claims, the remedies should be similarly limited.

5 The three remedial doctrines that we address in our
6 brief -- severability, equitable principles governing
7 preliminary injunctions, and Article III of the
8 Constitution -- each independently compels the same
9 commonsense result; that is, any remedy should go no farther
10 than enjoining the change in treatment of 3D-firearm files,
11 and should permit the rest of the rules, which everyone here
12 agrees have nothing to do with 3D printing, to go into effect
13 as scheduled.

14 Now, plaintiffs concede their harms are limited to
15 3D-firearm files, and in their brief, at reply 16, they say
16 the ideal remedy in fact would be an injunction limited to
17 3D-firearm files, and they've, at least, expressed openness
18 today to having a narrower remedy, yet it sounds like their
19 bottom-line conclusion in response to your question was it
20 could be all or nothing.

21 So to the extent they continue to seek a preliminary
22 injunction that would block the rules in their entirety, we
23 think that's legally infirm.

24 And to the extent they contend that the court lacks
25 ability to craft such a narrow remedy, that's wrong as both a

1 legal and practical matter.

2 Now, on the legal side, this court has both the authority
3 and, in fact, the obligation to tailor relief to alleged
4 harms. That's particularly true when you're talking about
5 the extraordinary remedy of a preliminary injunction. And
6 courts routinely offer preliminary injunctions as to just
7 part of a statute or part of a rule, and it does not turn on
8 how many subcategories the agency includes in its rule, or
9 how it defines particular categories, such that you can use
10 your pen to strike out just a particular provision.

11 There are lots of cases. We cite several in our brief on
12 pages 12 and 13. The State doesn't address any of them.
13 I'll just mention the leading case from the D.C. Circuit,
14 which tends to have the most of these APA sort of cases, just
15 because they have jurisdiction over those. That's the
16 *Yeutter* case, and at pages 977 to 978, the court gives a
17 discussion --

18 THE COURT: Counsel, you need to slow down.

19 MR. SHAH: Oh, sure.

20 So what that case involved was a Department of Agriculture
21 rule relating to drug testing of Department employees. And
22 it had a reasonable-suspicion standard in one part of the
23 rule that was at issue. And what it said is, look, if you
24 want to test any Department employee, they can be tested
25 subject to reasonable suspicion. And what the court said is,

1 Well, that -- and the plaintiff challenged that on Fourth
2 Amendment grounds -- and what the court said is, Look, I'm
3 going to give you an injunction that blocks enforcement of
4 that rule with respect to most employees at the Department of
5 Agriculture, but I'm going to carve out certain employees
6 that engage in safety-sensitive functions because, there, the
7 agency had more of an interest to test them.

8 That was not a category that was within the
9 reasonable-suspicion part of the rule. The court simply does
10 what court did -- what courts do all the time, which is craft
11 a preliminary injunction that is tailored to the harm. So
12 the court said, This rule will be preliminarily enjoined with
13 respect to all employees, except those engaged in
14 safety-sensitive functions.

15 So the court just drew its own category within the larger
16 rule, even though it couldn't take a pen and cross out a
17 portion of the rule. That happens all the time.

18 *Davis County* is another case that we cited. That wasn't
19 even a preliminary injunction case. That was just a straight
20 severability of the rule. That was involving an EPA rule
21 which imposed regulations on certain municipal waste
22 facilities. And what the court said is, Well, we're going to
23 vacate that rule except with respect -- I'm sorry -- We're
24 going to permit that rule, except with respect to cement kiln
25 facilities.

1 Cement kiln facilities were not even mentioned in the
2 rule, but it turned out, during argument and briefing, that
3 the parties agreed -- or the parties convinced the court that
4 cement kilns were a special subcategory, and the court simply
5 vacated the result, except with respect to cement kilns.

6 That's exactly the sort of same thing that we're asking
7 here; that the court can allow these rules to go into effect,
8 but simply enjoin it with respect to the 3D-firearm files,
9 and then leave it to the agencies to comply with an
10 injunction, which is what agencies do, when courts issue
11 injunctions, all the time.

12 Now, on the balance of equities, Your Honor, which,
13 obviously, is a part of a preliminary injunction, as to the
14 scope of the preliminary injunction, I think the State draws
15 a false dichotomy.

16 You are not weighing the harms from 3D-firearm files
17 versus the harms to the regulated entities that would not
18 benefit from this new regulatory scheme. Under our proposal,
19 you would be enjoining the change in treatment of 3D-firearm
20 files. So, by definition, there wouldn't be any harm on
21 3D-firearm files. So there's nothing on that side of the
22 balancing to do under this narrower injunction.

23 All of the harms from the broader injunction that the
24 State seems to seek enjoining the ruling wholesale, those
25 fall on thousands of businesses throughout the company [sic],

1 including NSSF members like Fredric's Arms, a small, solo gun
2 shop that has to pay this fee to the State Department that
3 would not have to pay it otherwise under the rules.

4 On the legal side, the last point I would make is, there
5 are Article III limits here, and so just using normal
6 principles of constitutional avoidance, the court should
7 avoid crafting a remedy that runs afoul -- potentially runs
8 afoul of Article III.

9 You explained the concern about a nationwide injunction,
10 that's a concern, but I think the even bigger concern is
11 about issuing a remedy that knocks out a rule -- two rules in
12 their entirety, when there is one -- only one tiny sliver of
13 the rule, which everyone agrees is causing the problem. That
14 is a such bigger Article III concern that it doesn't map onto
15 the injury-in-fact, and, of course, the Supreme Court has
16 been particularly sensitive about overbroad injunctions.

17 THE COURT: Counsel, let me ask you a practical
18 question.

19 MR. SHAH: Yes.

20 THE COURT: Have you gone through the rule to look
21 and see if -- if I gave you the power to go through and
22 strike out portions or provisions so it would be narrowly
23 crafted, what does this look like in the final analysis?

24 MR. SHAH: Sure, Your Honor.

25 So I think it's just like in the *Yeutter* case. I can't --

1 you can't take a pen and just say I'm going to cross out
2 these words. But just like in the *Yeutter* case, the court
3 said, Look, you, agency, you can implement this rule, except
4 with respect to this category of employees.

5 Your injunction, I think, could read very simply, just
6 like that.

7 So to be concrete, you can simply order the federal
8 agencies to maintain the same level of regulation or
9 effectiveness that currently exists on 3D-firearm files, and
10 then leave it to the agencies to figure out what they have to
11 do to implement that. Maybe that means -- to the extent that
12 you find there is some gap between the ITAR and the EAR,
13 maybe that means that Commerce will implement your injunction
14 by applying the same restrictions on publication that are
15 present in the ITAR. That would be one potential solution.

16 So the agencies have a lot of ways to implement a very
17 straightforward injunction, which is, the rules go into
18 effect as scheduled, but the agencies should maintain the
19 same level of regulatory restrictions on 3D-firearm files, or
20 to use the State's term, to close the gap between any -- and
21 to the extent any gap exists, if you find there's a gap, you
22 can order the agencies to close the gap.

23 And, again, the federal agencies, we would leave it to
24 them. And courts don't usually rewrite regulations. They
25 leave it or implement -- prescribe specific ways to implement

1 an injunction.

2 You set forth the injunction, Here's what you need to do
3 to remedy the violation, and then the agencies can come back
4 with you, Okay, here is how we're going to do it. Commerce
5 is going to apply the State Department standards for
6 publication. That would be one simple way to do it. Or the
7 State Department is going to continue to regulate 3D-firearm
8 files as if they appear on the USML. That would be another
9 way to do it.

10 I don't think you need to prescribe, Your Honor, exactly
11 how it needs to be done. You just need to tell them, You
12 can't allow these 3D-firearm files, you can't keep any gap in
13 regulatory restrictions that might otherwise exist, if you
14 find that such a gap exists.

15 So I think, for all of those reasons -- and, again, courts
16 do this all the time, day in and day out, so there is no
17 legal problem, and I think there is an easy injunction for
18 you to write, and then, practically, there are many ways for
19 the agencies to enforce it, and courts should leave the
20 federal agencies to figure out a way to do it, and if there
21 are any problems, of course, the parties will come back to
22 you, and it can be worked out at that point.

23 THE COURT: Counsel, when you say "if there are any
24 problems," then come back to me and work things out, doesn't
25 that, then, reposition the court into rewriting the rules?

1 MR. SHAH: No, Your Honor. I mean, I think -- again,
2 as I envision it, you would set out -- if you find that there
3 is a gap, say, between how the State Department was
4 regulating the publication of 3D-firearm files and how
5 Commerce is regulating, and then I realize that the parties
6 are disputing whether there's a gap or not, but let's say you
7 agree with the plaintiff that there is a gap, and you say, in
8 your injunction --

9 THE COURT: Slow down.

10 MR. SHAH: Sorry.

11 And then you say, in your injunction, federal agencies
12 take steps to close that gap. You have to continue to
13 regulate 3D-firearm files as you were before.

14 I think agencies, as they said here -- Mr. Soskin said
15 they would like an opportunity to tell you how they would
16 implement that injunction, and so it would be in front of all
17 of the parties, and if you signed off on it, they would
18 implement it, and I think that would be a straightforward way
19 to proceed.

20 THE COURT: Thank you, counsel.

21 MR. SHAH: Thank you, Your Honor.

22 THE COURT: Counsel for the plaintiffs?

23 MR. RUPERT: Sure.

24 THE COURT: Counsel, there are two areas I want you
25 to, at least, touch upon. I'm confident that you will. One

1 is, government's counsel made reference to the *Stagg* case,
2 and then second is to address the narrowly prescribed scope
3 of, essentially, the court adopting Mr. Shah's approach of
4 sending it back and directing the agencies to reformulate
5 their game plan.

6 MR. RUPERT: I'll address that one first, because I'm
7 struggling to remember which one was the *Stagg* case.

8 THE COURT: D.C. Circuit, I think.

9 MR. RUPERT: Yeah, okay.

10 The second question is an easy one. I think if it were
11 the approach where it was sent back to the agencies and the
12 court retained jurisdiction, we would be comfortable with
13 that approach.

14 Bear with -- if counsel could remind me of the *Stagg* case.

15 THE COURT: Counsel, go with the balance of your
16 rebuttal.

17 MR. RUPERT: Oh, this, I guess -- I tried to remember
18 exactly how counsel used *Stagg*, and I apologize for not
19 addressing that. But I believe that was -- *Stagg* related to
20 the functionality with the First Amendment as a backdrop. At
21 least that's what their brief is --

22 THE COURT: They're making a reference to 120.11.

23 MR. RUPERT: Oh, it's a First Amendment case here. I
24 guess I'm just trying to remember that quickly here, and I'm
25 losing the details of the case, having read too many of them,

1 Your Honor.

2 THE COURT: That's okay, counsel.

3 MR. RUPERT: But on the larger point of this claim,
4 you know, that the ITAR and the -- and these new proposals in
5 the AR on the published part of it and public domain are the
6 same, I would just point to the court to, you know, our reply
7 brief, where we cite a rule -- or a proposed rule from State
8 interpreting the ITAR that said you need pre-approval for --
9 for coming out with items.

10 And I think that -- just to back up a moment, too. I
11 think I jumped into too much detail.

12 One of the things that we're talking about here is
13 jurisdiction as well. So I think we're mixing and mashing
14 jurisdictions of the agencies and, perhaps, their discretion
15 about what to enforce.

16 You know, under Commerce's stripping provision, that I
17 discussed at length in my opening, they're going to lose
18 jurisdiction over items that are published here, and, you
19 know, we think that there is clear loopholes with that.

20 You know, what we think is the rules under the ITAR are
21 much more broad. Now, if -- you know, like, they're saying
22 that they don't review every item that a researcher is going
23 to go forward and produce, I mean, that's a discretionary
24 decision by them about how to enforce their rules, but they
25 have jurisdiction is the real question here, so I think

1 that's a major point that we would make.

2 But the one thing I wanted to emphasize in rebuttal -- I
3 think, you know, through your questions and through
4 everybody's presentations, we've covered most of the items --
5 is something that the government mentioned there; that if
6 there was an injunction, you know, they're willing to submit
7 a proposal about how to keep these items regulated, and
8 that's what we want.

9 Now, in their declarations, in their argument, they're
10 making statements that things are covered, and we think those
11 are post-hoc declarations that aren't going to have the force
12 of law. But if we could get -- if we could craft -- or if
13 the government could craft regulations where those did have
14 the force of law, I think that solves the issue. Because it
15 seems like all parties want to regulate these items. Some of
16 these declarations suggest that they thought they were doing
17 some things that we don't think that they've accomplished,
18 but it does feel like there's a way that the parties can come
19 together and craft regulations -- or the government is the
20 crafting party, but we could, perhaps, assist -- that gives
21 the necessary protections for export controls, as well as the
22 public, while at the same time, you know, allowing us to
23 craft something narrowly so it's not going to affect the
24 intervenors and the other parties that would be affected by
25 the transfer of these items.

1 Any other questions or issues you'd like me to address?

2 THE COURT: No other questions, counsel.

3 MR. RUPERT: Thank you.

4 THE COURT: All right. Thank you.

5 Counsel, I've given more than ample opportunity for all
6 the parties to raise all the issues that they wanted to
7 raise. You've answered, dutifully, all the questions I've
8 posed, and I deeply appreciate the detailed explanations and
9 the thoroughness of all your briefing. Lord knows you've
10 submitted a lot of material for the court to consider.

11 The court recognizes that we have deadlines that we have
12 to meet, and the court will do its best to meet that
13 deadline.

14 Now, one thing I do want to encourage, because it sounds
15 like there may be some opportunity for the parties to
16 continue to work together, and that's certainly strongly
17 encouraged by the court.

18 The plaintiffs in this matter have made some concessions,
19 essentially, to basically say, Judge if you go ahead with
20 Mr. Shah's argument, we'd be comfortable with that, and
21 that's different from the all-or-nothing approach that we
22 began with.

23 So I'm not here to mediate resolution; I'm here to make a
24 final determination. But what I strongly encourage the
25 parties is, as opposed to keeping that "V" separating the

1 parties, to work dutifully to try and see if you can come to
2 a resolution among yourselves. You'll be far happier if the
3 parties can come to a resolution as opposed to the court
4 imposing an edict that says this is the court's final
5 determination.

6 So I leave these words with you and strongly encourage the
7 parties to get together to see if you can come up with
8 something that makes reasonable sense and that all parties
9 can live with.

10 Thank you, all, again, and safe travels in your return
11 back home.

12 We'll be in recess.

13
14 (The proceedings concluded at 11:17 a.m.)
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 10th day of March 2020.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR
Official Court Reporter